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No. 79-5269

In the

Supreme Court of the United States

October Term, 1979

ROBERT EDWARDS, *Petitioner,*

v.

THE STATE OF ARIZONA, *Respondent.*

On Writ of Certiorari to the Arizona Supreme Court

SUPPLEMENTAL BRIEF FOR RESPONDENT

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ARGUMENT

The Record Shows That Petitioner Made an Intelligent, Knowing, and Voluntary Waiver of His Right to an Attorney.

Petitioner, in Argument II of his brief, contends that a waiver of the Sixth Amendment right to counsel must be judged by a different standard than a waiver of the Fifth Amendment right to remain silent. The Second Circuit, in the recent case of *United States v. Mohabir,*[1] held that, once a person has been indicted and the Sixth Amendment right to counsel has attached, the government must meet a higher standard to show a waiver of the right to counsel than it must meet to show a waiver of the right to remain

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[1] 624 F.2d 1140 (2d Cir. 1980).

silent.[2] In order to meet this higher standard, the government, in addition to giving the *Miranda* warnings,[3] must inform the person that he has been indicted, explain to the person what it means to be indicted, and inform the person of the nature and importance of the Sixth Amendment right he is giving up.[4]

Respondent submits that this holding does not apply to the present case for several reasons. In *United States v. Duvall*,[5] the Second Circuit held that the right to counsel did not attach upon arrest pursuant to a warrant obtained by the filing of a complaint.[6] It noted that the principal function of a complaint is to obtain an arrest warrant.[7] It therefore held that, in the period after a complaint has been filed and before an indictment is returned, all the government needs to show is a waiver of the *Miranda* rights.[8] In the present case, petitioner made his confession after the police had filed a complaint, but before the state had obtained an indictment. Under the reasoning in *Duvall*, the state would not have to meet the "higher standard" required by *Mohabir*.

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[2] 624 F.2d 1146, 1148, 1151; *accord, Carvey v. LeFevre*, 611 F.2d 19 (2d Cir. 1979), *cert. denied*, _____ U.S. _____, 100 S.Ct. 1858, 64 L.Ed.2d 276 (1980). This reasoning stems from the dissent by Judge Friendly in *United States v. Massimo*, 432 F.2d 324, 327 (2d Cir. 1970), *cert. denied*, 400 U.S. 1022 (1971).

[3] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[4] 624 F.2d at 1149, 1151. The court went on to hold that it would not be sufficient for the government agents or the prosecuting attorney to give these warnings; the higher standard could be met only if a magistrate gave them. 624 F.2d at 1153. This was not a constitutional requirement, but was instead done in an exercise of the court's supervisory powers. *Id.*

[5] 537 F.2d 15 (2d Cir.) (Friendly, J.), *cert. denied*, 426 U.S. 950 (1976).

[6] 537 F.2d at 22.

[7] *Id.*

[8] 537 F.2d at 20-22.

Moreover, the other circuits have not followed the Second Circuit in adopting this "higher standard" for post-indictment statements. The First Circuit, in *United States v. Payton*,[9] held that it need not decide whether and to what extent to adopt the position of the Second Circuit because, in that case, the defendant had been told that he had been indicted.[10] It had previously held, in *United States v. Monti*,[11] in a situation where the defendant had been arrested and arraigned, and had an attorney appointed to represent him, that the *Miranda* warnings were sufficient to allow the confession to be admissible.[12] The Third[13] and Seventh[14] Circuits have held that the government must meet a "higher standard" once the defendant has been appointed counsel, but have not applied this rule prior to the appointment of counsel. The Sixth,[15] Eight,[16] and Ninth[17] Circuits have held that a waiver of the *Miranda* rights is sufficient to allow admission of a confession obtained after the defendant was indicted, and after the defendant had been arraigned and appointed counsel. The Fifth Circuit,[18] without deciding whether the Sixth Amendment right to counsel attached, held that a waiver of the *Miranda* rights was sufficient to

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[9] 615 F.2d 922 (1st Cir. 1980).

[10] 615 F.2d at 924.

[11] 557 F.2d 899 (1st Cir. 1977).

[12] 557 F.2d at 904.

[13] *United States v. Cobbs*, 481 F.2d 196 (3d Cir.), *cert. denied*, 414 U.S. 980 (1973); *see United States v. Crook*, 502 F.2d 1378 (3d Cir. 1974).

[14] *United States v. Springer*, 460 F.2d 1344 (7th Cir.), *cert. denied*, 409 U.S. 873 (1972); *see United States v. Durham*, 475 F.2d 208 (7th Cir. 1973).

[15] *Arrington v. Maxwell*, 409 F.2d 849 (6th Cir.), *cert. denied*, 396 U.S. 944 (1969).

[16] *Moore v. Wolff*, 495 F.2d 35 (8th Cir. 1974).

[17] *United States v. Mandley*, 502 F.2d 1103 (9th Cir. 1974); *Coughlan v. United States*, 391 F.2d 371 (9th Cir.), *cert. denied*, 393 U.S. 870 (1968).

[18] *United States v. Brown*, 569 F.2d 236 (5th Cir. 1978) (en banc).

waive any Sixth Amendment rights. The Tenth Circuit[19] has held that obtaining a confession from a defendant who has an attorney is an ethical violation, but not a constitutional one. In light of this lack of authority to support the "higher standard" rule of the Second Circuit, respondent asks this Court to hold that a waiver of the *Miranda* rights is sufficient to waive the rights under the Sixth Amendment. This is because the warnings required by *Miranda* include both the right to remain silent and the right to an attorney. Waiver of these two rights should be all that is needed for a confession to be admissible.

Finally, even under the "higher standard" rule of the Second Circuit, petitioner's confession would be admissible because petitioner knew all of the things that the Second Circuit requires. When Sergeant Bunting arrested petitioner, he advised petitioner of the charges against him and showed him a copy of the arrest warrant.[20] On four different occasions,[21] the officers advised petitioner pursuant to *Miranda* that he had the right to an attorney. Petitioner knew that the state was going to prosecute him for murder as shown by his asking to make a deal and asking to talk to the prosecuting attorney.[22] Petitioner stated that he had been around and knew what was going

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[19] *United States v. Thomas*, 474 F.2d 110 (10th Cir.), *cert. denied*, 412 U.S. 932 (1973).

[20] J.A. at 101-02.

[21] J.A. at 20 (by Officer Allen at the time of arrest); J.A. at 45, 102, 111 (by Sergeant Bunting upon arrival at the police station); J.A. at 33, 45, 104, 111 (by Sergeant Bunting prior to the taped statement); J.A. at 57, 123, 141 (by Detective Marmion prior to the oral confession).

[22] J.A. at 36, 39, 40, 44, 107, 111.

on.[23] Finally, petitioner represented himself through two trials. The record shows that petitioner knew that he was entitled to an attorney and knew what an attorney could do for him, and made an intelligent, knowing, and voluntary waiver of this right.

CONCLUSION

For all of the above-stated reasons, respondent respectfully requests that this Court affirm the judgment of the Arizona Supreme Court.

Respectfully submitted,

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[23] J.A. at 39. On April 6, 1972, petitioner was arrested for robbery in Arizona. He was convicted and sentenced to a term of 5 to 6 years in prison. On February 27, 1974, he was paroled. On November 10, 1975, petitioner was arrested for attempt to assault a mailman. 18 U.S.C. § 2114. He was tried and found not guilty on January 13, 1976. In *United States v. Lord*, 565 F.2d 831 (2d Cir. 1977), the Second Circuit held that the government had met the "higher standard" because the defendant had been arrested on three previous occasions, and was familiar with his rights. 565 F.2d at 840. In *United States v. Diggs*, 497 F.2d 391 (2d Cir.), *cert. denied*, 419 U.S. 861 (1974), the Second Circuit found a valid waiver noting that the defendant had been advised of his rights at least three times and had been arrested more than 21 times. 497 F.2d at 393 and n.2.